

ESTTA Tracking number: **ESTTA661502**

Filing date: **03/17/2015**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91206212
Party	Plaintiff Carefusion 2200, Inc.
Correspondence Address	JOSEPH R DREITLER DREITLER TRUE LLC 19 E KOSSUTH STREET COLUMBUS, OH 43206 UNITED STATES mtrue@ustrademarklawyer.com, jdreitler@ustrademarklawyer.com, ttro- fino@ustrademarklawyer.com
Submission	Motion to Extend
Filer's Name	Mary R. True
Filer's e-mail	jdreitler@ustrademarklawyer.com, mtrue@ustrademarklawyer.com, ttro- fino@ustrademarklawyer.com
Signature	/Mary R. True/
Date	03/17/2015
Attachments	CFN-Entrotech - Motion to Extend Testimony Period - final.pdf(40906 bytes) True Declaration with Exhibits.pdf(3110873 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

**IN THE MATTER OF Trademark Application Serial Nos. 85499349; 85499345; 85499337
and 85499332**

DATE OF PUBLICATION: May 29, 2012

CareFusion 2200, Inc.,)	
)	
Opposer,)	Combined Opposition No. 91206212
)	
v.)	
)	
Entrotech Life Sciences,)	
)	
Applicant.)	

**OPPOSER’S MOTION TO SUSPEND OR EXTEND OPPOSER’S TESTIMONY PERIOD
FOR PURPOSES OF TAKING TESTIMONY DEPOSITION OF DR. JOHN FOOR**

Pursuant to Rules 701 and 703.01(c) of the Trademark Trial and Appeal Board Manual of Procedure (“TBMP”), Opposer respectfully requests that its Testimony Period be suspended or extended for the sole purpose of taking the testimony deposition of Dr. John Foor.¹

On February 5, 2015, Opposer provided Applicant with its Pretrial Disclosures, identifying John Foor, M.D. as a testimony witness in this case. (See Declaration of Mary R. True (“True Decl.”) at Exhibit A.) Dr. Foor had been identified as a person with discoverable information by Applicant in its preliminary pretrial disclosures, and previously testified in deposition on June 17, 2014 during the Discovery period as a witness called by Opposer. The deposition took place in Columbus, Ohio, where Dr. Foor resides and is employed.

On March 3, 2015, Opposer requested that Applicant’s counsel stipulate to the filing of Dr. Foor’s Discovery deposition (True Decl. at Ex. B). On March 4, 2015, counsel for Applicant responded that she would not stipulate to the filing of Dr. Foor’s Discovery deposition (True Del.

¹ On March 12, 2015, Counsel for Opposer informed Counsel for Applicant that the Motion to Quash necessitated Opposer’s filing the instant motion with the Board. Counsel for Applicant did not respond.

at Exhibit C). On March 4, 2015, Opposer had the United States District Court for the Southern District of Ohio (where Dr. Foor resides and works) issue a subpoena for Dr. Foor's testimony in this case to take place on March 19, 2015 in Columbus, Ohio (See True Decl. at Exhibit D). The subpoena was served at Dr. Foor's medical office on March 5, 2015 (See True Decl. at Exhibit E). March 19, 2015 is within Opposer's current testimony period.

On March 11, 2015, Applicant filed a Motion to Quash the subpoena issued on Dr. Foor with the United States District Court for the Southern District of Ohio (See True Decl. at Exhibit F). On March 12, 2015, Opposer's counsel advised Applicant's counsel that it would be filing this motion to extend Opposer's testimony period to take the testimony deposition of Dr. Foor and hand delivered a Notice of taking testimony to Applicant's counsel (See True Decl. at Exhibit G). One of the bases raised for the Motion to Quash was that the subpoena was purportedly defective because it was not issued by the Clerk of Court. Accordingly, on March 17, 2015, Opposer had the subpoena to Dr. Foor reissued by the Court and will be serving Dr. Foor and counsel for Applicant with the reissued subpoena and an Amended Notice of Deposition for his testimony deposition in Columbus, Ohio on March 23, 2015, the final day of Opposer's testimony period as currently set by the Board (See True Decl. at Exhibit H).

Given that Opposer's Testimony Period is set to close on March 23, 2015 and Dr. Foor will not be appearing to testify between today and the close of Opposer's Testimony period, Opposer respectfully requests, pursuant to TBMP 701, that the Board suspend or extend Opposer's testimony period for the sole purpose of permitting Opposer to conduct a testimony deposition of Dr. Foor in the event that the motion to quash the subpoena for Dr. Foor to testify is denied by the United States District Court for the Southern District of Ohio.

Dated: March 17, 2015

Respectfully submitted,

/s/ Mary R. True

Mary R. True

Joseph R. Dreitler

DREITLER TRUE LLC

19 East Kossuth Street

Columbus, Ohio 43206

Telephone: (614) 449-6677

Email: jdreitler@ustrademarklawyer.com

mtrue@ustrademarklawyer.com

Attorneys for Opposer CareFusion 2200, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by electronic mail upon Applicant's attorney of record in this proceeding on this 17th day of March, 2015, at the following email address:

Erin M. Hickey hickey@fr.com
Lisa Martens martens@fr.com
Fish & Richardson PC
12390 El Camino Real
San Diego, CA 92130

/s/ Mary R. True
Mary R. True

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

**IN THE MATTER OF Trademark Application Serial Nos. 85/499349; 85/499345;
85/499337 and 85/499332**

DATE OF PUBLICATION: May 29, 2012

CareFusion 2200, Inc.,

Opposer, Combined Opposition No: 91-206,212

v.

Entrotech Life Sciences, Inc.

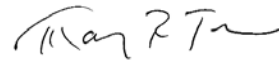
Applicant.

DECLARATION OF MARY R. TRUE, ESQ.

1. I am a partner in the law firm Dreitler True LLC and am one of the counsel representing Opposer CareFusion 2200, Inc. in the above captioned combined opposition.
2. The documents attached hereto are true and accurate copies of electronic communications contained in my files or papers I have filed or have been served in this matter.
3. Attached hereto as Exhibit A are Opposer's Pretrial Disclosures, which were served on Erin Hickey, counsel for Applicant on February 5, 2015.
4. Attached hereto as Exhibit B is a copy of a March 3, 2015 email from Mary True to Erin Hickey.
5. Attached hereto as Exhibit C is a copy of a March 4, 2015 email from Erin Hickey to Mary True.
6. Attached hereto as Exhibit D is a copy of the subpoena issued to Dr. John Foor.
7. Attached hereto as Exhibit E is the affidavit of service for the subpoena issued to Dr. John Foor.
8. Attached hereto as Exhibit F is a copy of the Motion to Quash the Subpoena of Dr. John Foor filed by counsel for Applicant on March 11, 2015 in the United States District Court for the Southern District of Ohio.
9. Attached hereto as Exhibit G is a copy of the Notice of Testimony Deposition of Dr. John Foor that was hand delivered to Erin Hickey on March 12, 2015.

10. Attached hereto as Exhibit H is a copy of the re-issued subpoena issued to Dr. John Foor on March 17, 2015, along with the Amended Notice of Testimony Deposition which will be served upon Dr. Foor and counsel for Applicant.

I declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge.



Mary R. True

Exhibit A

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

IN THE MATTER OF Trademark Application Serial Nos. 85/499349; 85/499345; 85/499337
and 85/499332

DATE OF PUBLICATION: May 29, 2012

CareFusion 2200, Inc.,	:	
	:	
Opposer,	:	
	:	
v.	:	Combined Opposition No.: 91206212
	:	
Entrotech Life Sciences, Inc.,	:	
	:	
Applicant.	:	

**PRETRIAL DISCLOSURES OF
OPPOSER CAREFUSION 2200, INC.**

Pursuant to Rule 2.121(e) of the Rules of Practice of the Trademark Trial and Appeal Board and F.R.C.P. 26(a)(3), Opposer CareFusion 2200, Inc. (“CareFusion”) makes the following pretrial disclosures:

I. Identification of individuals likely to give testimony as witnesses:

A. Jan Creidenberg
Vice President, Marketing Manager
CareFusion Corporation

Mr. Creidenberg may testify on the uses of Opposer’s topical antimicrobial products, including products bearing the CHLORA__ formative marks, including information on the persons who use them, how they are used, for what purposes and what other products are often used in connection with Opposer’s products; Opposer’s advertising, marketing and promotion of Opposer’s topical antimicrobial products, including products bearing the CHLORA__ formative marks; Opposer’s sales of products bearing the CHLORA__ formative marks, including information on the marketing channels in which such products are advertised, marketed, promoted and/or sold and competitive antimicrobial products, and information regarding plans for the introduction of new topical antimicrobial products, including products bearing the CHLORA__ formative marks.

Mr. Creidenberg may also testify regarding the business relationship between Opposer (and its related company CareFusion 213 LLC) and Applicant's related entity, Entrofoor Medical, LLC, for the purpose of Entrofoor Medical, LLC developing and manufacturing chlorhexidine drape for CareFusion 2200 to license and distribute.

B. Colleen Glynn
Director, Marketing and Product Management
CareFusion Corporation

Ms. Glynn may testify on how Opposer's topical antimicrobial products, including products bearing the CHLORA formative marks, are sold, to whom and their prices, and on total sales of Opposer's topical antimicrobial products, including products bearing the CHLORA formative marks.

C. Jennifer Raeder-Devens
Vice President, R&D Engineering Management
CareFusion Corporation

Ms. Raeder-Devens may testify on the development and research connected with Opposer's topical antimicrobial products, and on plans for the introduction of new topical antimicrobial products, including products bearing the CHLORA formative marks.

Ms. Raeder-Devens may also testify regarding the business relationship between Opposer and Applicant's related entity, Entrofoor Medical, LLC, for the purpose of Entrofoor Medical, LLC developing and manufacturing chlorhexidine drape for CareFusion 2200 to license and distribute.

D. Dr. John Foor, M.D.
Medical Consultant
Entrotech Life Sciences

Dr. Foor may testify about the recognition of the Chloraprep brand in the medical/surgical community, his personal knowledge of the Chloraprep brand, and about the formation of Entrofoor Medical, LLC and its business relationship with Opposer for the purpose of Entrofoor Medical, LLC developing and manufacturing chlorhexidine drape for CareFusion 2200 to license and distribute.

All witnesses, with the exception of Dr. Foor, are represented by counsel for CareFusion and may be contacted only through CareFusion's counsel in this matter.

II. Description of Documents Upon Which Opposer May Rely

Examples of advertising, marketing and promotional materials for Opposer's topical antimicrobial products, including products bearing the CHLORA__ formative marks

Evidence of advertising and marketing expenditures for Opposer's topical antimicrobial products, including products bearing the CHLORA__ formative marks

Evidence regarding the dollar amount of sales of Opposer's topical antimicrobial products, including products bearing the CHLORA__ formative marks

Evidence regarding the channels of trade for the sales of Opposer's topical antimicrobial products, including products bearing the CHLORA__ formative marks

Examples of products bearing Opposer's CHLORA__ formative marks

File history from USPTO on Opposer's CHLORA__ formative marks

Documents relating to the business relationship between Opposer's related entity CareFusion 213, LLC and a related entity to Applicant, Entrofoor Medical, LLC.

Respectfully submitted,

DREITLER TRUE LLC

/Joseph R. Dreitler/

Joseph R. Dreitler

Mary R. True

19 E. Kossuth St.

Columbus, OH 43206

Telephone: 614-449-6677

E-mail: jdreitler@ustrademarklawyer.com

E-mail: mtrue@ustrademarklawyer.com

*Attorneys for Opposer
CareFusion 2200, Inc.*

Dated: February 5, 2015

CERTIFICATE OF SERVICE

This will certify that on the 5th day of February, 2015, a true and correct copy of the *Pretrial Disclosures of Opposer CareFusion 2200, Inc.* was served via e-mail to hickey@fr.com.

/Joseph R. Dreitler/
Joseph R. Dreitler

Exhibit B

From: [Mary True](#)
To: ["Erin Hickey \(Hickey@fr.com\)"](#)
Cc: [Joseph Dreidler](#); [Tom Trofino](#)
Subject: Foor Discovery Deposition
Date: Tuesday, March 03, 2015 11:53:02 AM

Erin –

Would you agree to stipulate that we can submit Dr. Foor's discovery deposition under a Notice of Reliance? Otherwise, we will need to take his testimony during the testimony period. Should we work through you to get that scheduled?

Mary

Mary R True
DREITLER TRUE LLC
19 E. KOSSUTH ST
COLUMBUS OH 43206-2001
614.449.6677
614.449.6642(direct)
513.404.5875(cell)
mtrue@ustrademarklawyer.com

Exhibit C

From: [Erin Hickey](#)
To: [Mary True](#)
Cc: [Joseph Dreidler](#); [Tom Trofino](#)
Subject: RE: Foor Discovery Deposition
Date: Wednesday, March 04, 2015 3:33:16 PM

Hi Mary,

I can't agree to stipulate that you can submit Dr. Foor's discovery deposition under a Notice of Reliance, given that I did not have an opportunity to cross examine him during his discovery deposition nor was I aware that you would later try to submit his discovery deposition under a Notice of Reliance (essentially, as a testimony deposition) during your client's testimony period. Also, I checked with Dr. Foor, and he is unavailable for at least the next two weeks, given his busy schedule as a vascular surgeon.

Erin

From: Mary True [mailto:mtrue@ustrademarklawyer.com]
Sent: Tuesday, March 03, 2015 8:53 AM
To: Erin Hickey
Cc: Joseph Dreidler; Tom Trofino
Subject: Foor Discovery Deposition

Erin –

Would you agree to stipulate that we can submit Dr. Foor's discovery deposition under a Notice of Reliance? Otherwise, we will need to take his testimony during the testimony period. Should we work through you to get that scheduled?

Mary

Mary R True
DREITLER TRUE LLC
19 E. KOSSUTH ST
COLUMBUS OH 43206-2001
614.449.6677
614.449.6642(direct)
513.404.5875(cell)
mtrue@ustrademarklawyer.com

This email message is for the sole use of the intended recipient(s) and may contain confidential and privileged information. Any unauthorized use or disclosure is prohibited. If you are not the intended recipient, please contact the sender by reply email and destroy all copies of the original message.

Exhibit D

UNITED STATES DISTRICT COURT

for the

Southern District of Ohio

CareFusion 2200, Inc.

Plaintiff

v.

Entrotech Life Sciences, Inc.

Defendant

Civil Action No. TTAB Opposition 91206212

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: John S. Foor, MD

(Name of person to whom this subpoena is directed)

☒ **Testimony:** **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Place: Dreitler True LLC 19 East Kossuth Street Columbus, OH 43206	Date and Time: 03/19/2015 10:00 am
--	---------------------------------------

The deposition will be recorded by this method: stenographic means

- ☐ **Production:** You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 03/04/2015

CLERK OF COURT

OR

/Mary R. True/

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party) CareFusion 2200

, who issues or requests this subpoena, are:
Mary R. True, Dreitler True LLC, 19 East Kossuth, Cols, OH 43206, mtrue@ustrademarklawyer.com, 614-449-6642

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. TTAB Opposition 91206212

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____
on *(date)* _____ .

☐ I served the subpoena by delivering a copy to the named individual as follows: _____

_____ on *(date)* _____ ; or

☐ I returned the subpoena unexecuted because: _____
_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____ .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

Exhibit E

Civil Action No. TTAB Opposition 91206212

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for (name of individual and title, if any) John S. Foos M.D.
on (date) 3.4.15.

☒ I served the subpoena by delivering a copy to the named individual as follows:
Receptionist "Sally S." on behalf of John S. Foos M.D.
on (date) 3.5.15; or

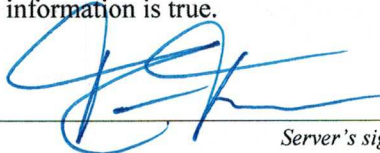
☐ I returned the subpoena unexecuted because: _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: 3.5.15



Server's signature

Ron Freeman, Private Process Server
Printed name and title

2400 Indiana Ave. Columbus, OH 43202
Server's address

Additional information regarding attempted service, etc.:

Exhibit F

**THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

CareFusion 2200, Inc.)	Case No. _____
)	
Plaintiff,)	(Pending Before T.T.A.B. In Trademark
)	Opposition No. 91-206,212)
v.)	
)	Judge _____
Entrotech Life Sciences, Inc.)	
)	Magistrate Judge _____
Defendants.)	
)	
)	

**DR. JOHN S. FOOR, M.D.’S MOTION TO QUASH OR, IN THE ALTERNATIVE, TO
MODIFY THE SUBPOENA ISSUED BY CAREFUSION 2200, INC.**

Dr. John S. Foor, M.D. (“Dr. Foor”), a non-party to the underlying Trademark Opposition pending before the Trademark Trial and Appeal Board, hereby moves the Court for an Order quashing the subpoena purportedly served by CareFusion 220, Inc. on March 5, 2015. The reasons for this Motion are set forth more fully in the attached Memorandum in Support. A copy of the subpoena is attached as Exhibit 1.

Respectfully submitted,

/s/ Timothy R. Bricker

Timothy R. Bricker (0061872)
CARPENTER LIPPS AND LELAND LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, OH 43215 Telephone: (614) 365-4100
Facsimile: (614) 365-9145
E-mail: carpenter@carpenterlipps.com
Trial Attorney for Dr. John S. Foor, M.D.

Of Counsel:

Michael H. Carpenter (0015733)
Caitlin E. Murphy (0090665)
Erik P. Henry (0085155)
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280 North High Street
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Telephone: (614) 365-4100
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E-mail: bricker@carpenterlipps.com
murphy@carpenterlipps.com

Erin M. Hickey
FISH & RICHARDSON P.C.
12390 El Camino Real
San Diego, CA 92130
Telephone: (858) 678-5070
Email: hickey@fr.com

**MEMORANDUM OF LAW IN SUPPORT OF DR. JOHN S. FOOR, M.D.’S
MOTION TO QUASH OR, IN THE ALTERNATIVE, TO MODIFY
THE SUBPOENA ISSUED BY CAREFUSION 2200, INC.**

Dr. John S. Foor, M.D. is a respected vascular surgeon with an active practice and surgery schedule located in Central Ohio. On Friday, March 5, 2015, a subpoena requiring that he appear for a deposition on March 19, 2015 was left with a receptionist.¹ The subpoena was served by CareFusion 2200, Inc. (“CareFusion”), and relates to a trademark opposition action currently pending before the Trademark Trial and Appeal Board (“T.T.A.B.”) of the United States Patent and Trademark Office captioned *CareFusion 2200, Inc. v. Entrotech Life Sciences, Inc.*, Trademark Opposition No. 91-206,212. For purposes of any testimony Dr. Foor provides as part of the T.T.A.B. matter, (whether discovery deposition testimony or trial testimony), Dr. Foor is represented by counsel for Entrotech Life Sciences, Inc. (“Entrotech”), and he has signed an engagement letter memorializing this understanding. Counsel for CareFusion is aware that counsel for Entrotech represents Dr. Foor for these purposes.

As discussed more fully below, Dr. Foor now moves to quash the subpoena, or, in the alternative, to have it be modified. In particular, Dr. Foor moves to quash the subpoena because it imposes an undue burden on his patients and himself, and, seeks only duplicative testimony already taken during a nearly seven-hour deposition which occurred almost nine months ago. The subpoena is particularly improper because CareFusion and its counsel have been aware since at least March 4, 2015, that Dr. Foor is unavailable for a deposition in March due his demanding schedule as a vascular surgeon, including a booked schedule of patient visits and procedures. Moreover, due to two other trial testimony depositions CareFusion noticed in the T.T.A.B proceeding which are taking place this week in Chicago, Illinois, the undersigned counsel for Dr.

¹ A copy of the subpoena and service affidavit is attached as Exhibit 1.

Foor and Entrotech will be unable to adequately prepare and, if the deposition proceeds, will have only three days to: (1) fly to Columbus, Ohio from San Diego, California and review materials in order to competently prepare to defend Dr. Foor's trial testimony deposition (which is akin to the trial testimony of a non-party, adverse witness, as explained further below); (2) meet with Dr. Foor to prepare him for his testimony; and (3) defend Dr. Foor's testimony during CareFusion's questioning and be prepared to examine him on his own and Entrotech's behalf. This very brief time period that CareFusion seeks to force on Dr. Foor and his counsel, as well as Entrotech, and the resulting disruption of Dr. Foor's and his patients' schedules is unreasonable and improper for the reasons explained herein.

Additionally, the subpoena is procedurally deficient. CareFusion never applied to the Clerk of Court for the Southern District of Ohio to have the subpoena properly issued, as required by the plain language of 35 U.S.C. § 24.² As a result of this procedural error, this subpoena—and CareFusion's service of same—are invalid and ineffective.

BACKGROUND

By way of background, the action underlying this proceeding is a trademark opposition proceeding before the T.T.A.B. of the United States Patent and Trademark Office. Currently, the parties are in trial before the T.T.A.B. Importantly, the rules governing the litigation of T.T.A.B. proceedings sometimes vary from the Federal Rules of Civil Procedure, especially during the trial phase, when the case before the T.T.A.B. is, essentially, tried on paper. The "testimony depositions" referenced herein are equivalent to the trial testimony of these witnesses, which are taken by deposition and filed with the T.T.A.B. during the party's testimony period, instead of

² On March 10, 2015, counsel for Dr. Foor confirmed via a telephone call with the clerk of this Court that no miscellaneous matter had been opened in the parties' names, as required under 35 U.S.C. § 24. The Court confirmed that a miscellaneous matter would need to be opened for the Court to issue or enforce any subpoena.

presented in court before a judge or jury. In comparison, the “discovery deposition” referenced herein is the same type of discovery tool allowed by the Federal Rules of Civil Procedure and regularly used by litigators in civil cases. If the Court would find it helpful, counsel would be pleased to hold a teleconference with opposing counsel and the Court about this proceeding and its current posture.

On June 17, 2014, CareFusion took almost seven hours of deposition testimony from Dr. Foor, who is a non-party witness. Eight months later, on February 5, 2015, CareFusion listed three witnesses in its pretrial disclosures, along with Dr. Foor, as individuals who “may” testify. Such disclosure, however, does not substitute for issuance of a proper notice of examination under the Trademark Rules of Practice. *See* 37 C.F.R. § 2.123(c). Following these pretrial disclosures, CareFusion’s counsel corresponded frequently with Entrotech’s counsel in February regarding scheduling the testimony depositions of CareFusion’s own three witnesses during its 30-day testimony (or trial) period, which closes March 23, 2015, but never mentioned that it intended to seek Dr. Foor’s trial testimony during CareFusion’s testimony period. Not until March 3, 2015 did CareFusion mention Dr. Foor affirmatively as a testimony witness for CareFusion’s case—and, on that day, CareFusion’s counsel e-mailed Entrotech’s counsel requesting that it stipulate to CareFusion’s submission of Dr. Foor’s discovery deposition as evidence, which, absent Entrotech’s consent, would not be allowed into evidence under the Trademark Rules of Practice.

Dr. Foor is not a party to the opposition, nor was he an officer, director, managing agent, or person designated to testify under Fed. R. Civ. P. 30(b)(6) or 31(a)(4) at the time of his deposition. 37 C.F.R. § 2.120(j) makes clear that the only way his discovery deposition can be offered into evidence is if it is stipulated to by the parties or otherwise approved by the Board.

See Galaxy Metal Gear Inc. v. Direct Access Tech. Inc., 91 U.S.P.Q.2d 1859, 1862 (T.T.A.B. 2009) (discovery deposition may be filed by notice of reliance if parties have stipulated to introduction of the deposition). Limited exceptions apply where the witness is dead, unable to testify because of age, illness, infirmity, or imprisonment, or unable to be properly served with a subpoena. None of these exceptions apply to Dr. Foor.

Because Entrotech's counsel never had the opportunity to cross-examine Dr. Foor during his discovery deposition, she declined to stipulate to opposing counsel's request to submit the deposition as evidence and, essentially, serve as a testimony deposition that was never subject to a cross-examination. *See* 37 C.F.R. § 2.123(e)(3) ("Every adverse party shall have full opportunity to cross-examine each witness."). Although CareFusion's counsel initially believed it necessary to ask Entrotech's counsel to stipulate to submitting the discovery deposition as evidence, once Entrotech's counsel declined to stipulate, CareFusion promptly (and incorrectly) decided that opposing counsel's consent was not necessary, and CareFusion could properly submit Dr. Foor's discovery deposition into evidence under 37 C.F.R. § 2.120(j). Yet, in the same e-mail, CareFusion's counsel also advised that it would issue a subpoena for his deposition during CareFusion's testimony period. On March 5, 2015, CareFusion submitted Dr. Foor's discovery deposition under 37 C.F.R. § 2.120(j), and the same day, on March 5, 2015, issued a subpoena for Dr. Foor's testimony deposition on March 19, 2015, five days before the close of CareFusion's testimony period and despite CareFusion being on notice as of March 3, 2015 that Dr. Foor was unavailable in March due to a booked schedule of patient visits and procedures and his otherwise demanding schedule as a vascular surgeon. Notably, for all of the other witnesses, CareFusion sent testimony notices over three weeks prior, on February 12, 2015. Indeed, it is quite clear that the only reason the notice of Dr. Foor's trial testimony was so delayed was

because CareFusion assumed, incorrectly, that it could just submit his discovery deposition and have that serve as his testimony—without any cross examination by Entrotech’s counsel.

Importantly, two other trial testimony depositions for CareFusion’s witnesses are taking place during the remaining two weeks of CareFusion’s testimony period in Chicago, Illinois: the deposition of Jan Creidenberg on March 12, 2015, and the deposition of Jennifer Raeder-Devens on March 13, 2015. Because counsel for Entrotech will be flying to Chicago from San Diego on March 11, 2015 and will be preparing for and participating in both of these depositions, the week of March 9 is effectively unavailable for Dr. Foor’s testimony, or his preparation for the same, and Dr. Foor is unavailable for the remainder of CareFusion’s testimony period. Moreover, Dr. Foor’s counsel is equally unavailable due to a prior professional commitment the week of March 16 in Austin, Texas, of which CareFusion’s counsel was well aware. Not only did Dr. Foor’s counsel previously cancel that commitment to comply with CareFusion’s initial scheduling requests for the depositions of its own witnesses for the week of March 16th, but, after re-scheduling the commitment once, CareFusion unilaterally changed those depositions to the week of March 9—notably, just two days after CareFusion’s counsel was informed that she had cancelled the commitment to comply with the initial scheduling request.

Promptly after receiving notice that CareFusion would issue a subpoena for Dr. Foor, Dr. Foor’s and Entrotech’s counsel notified CareFusion’s counsel that Dr. Foor would be unable to attend a deposition on the noticed date or during the testimony period, detailed the procedural improprieties regarding the submission of Dr. Foor’s discovery deposition as evidence, and put CareFusion on notice that it would file the instant motion.

LEGAL STANDARD

Proceedings relating to non-parties subpoenaed in a matter before the T.T.A.B. are within the control of the district court issuing the subpoena. *Luehrmann v. Kwik Kopy Corp.*, 2 U.S.P.Q.2d 1303 (T.T.A.B. 1987); *see also* 35 U.S.C. § 24. Since CareFusion's subpoena was issued from the Southern District of Ohio, this Court has jurisdiction to quash it or, at a minimum, modify it for a week that is reasonable for Dr. Foor and his schedule.

While a subpoena for a testimony in the T.T.A.B. under these facts and circumstances is unique, cases holding discovery depositions and subpoenas as unduly burdensome are applicable here, because the time in which to respond must be reasonable and cannot unduly burden the deponent. “[T]he issuing court must quash or modify a subpoena that . . . subjects a person to undue burden.” Fed. R. Civ. P. 45(c)(3)(A)(iv); *see also Info-Hold, Inc. v. Sound Merch., Inc.*, 538 F.3d 448, 457 (6th Cir. 2008) (quoting *Surles ex rel. Johnson v. Greyhound Lines, Inc.*, 474 F.3d 288, 305 (6th Cir. 2007)) (“[D]istrict courts have discretion to limit the scope of discovery where the information sought is overly broad or would prove unduly burdensome to produce.”). In considering whether the discovery sought is unduly burdensome, the Court considers whether “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, and the importance of the discovery in resolving the issues.” Fed. R. Civ. P. 26(b)(2)(C)(iii); *Surles*, 474 F.3d at 305 (same). In addition, “the status of a person as a non-party is a factor that weighs against disclosure.” *See American Elec. Power Co., Inc. v. U.S.*, 191 F.R.D. 132, 136 (S.D. Ohio 1999); *Vietnam Veterans of Am. v. C.I.A.*, No. 2:11-Civ-16, 2011 WL 4714000, at *5 (S.D. Ohio Oct. 6, 2011) (finding deposition topic overly burdensome where information was available via less burdensome means and information to be gained was of little importance to the resolution of the issues underlying the litigation).

ARGUMENT

Forcing Dr. Foor, to be deposed again during the testimony period is “unreasonably cumulative [and] duplicative[.]” given his booked schedule as a vascular surgeon for the remaining two weeks of the testimony period and is a “burden or expense” that is not outweighed by any benefit to CareFusion. Fed. R. Civ. P. 26(b)(2). Because Dr. Foor is a non-party to the litigation, CareFusion has a duty to “take reasonable steps to avoid imposing undue burden or expense upon persons subject to [a] subpoena.” Fed. R. Civ. P. 45. Although CareFusion’s counsel requested that Entrotech’s counsel stipulate to allow his testimony into evidence to avoid this situation, CareFusion’s efforts are disingenuous and are only an attempt to cover its missteps in failing to recognize that Dr. Foor’s testimony was not automatically admissible through a Notice of Reliance during its testimony period. Had CareFusion acted diligently, it would have known from the very beginning that this discovery deposition would be inadmissible at this stage, and it could have taken steps to treat his discovery deposition as a testimony deposition and avoided this situation entirely.

I. CareFusion’s Subpoena of Dr. Foor is Unreasonable

CareFusion’s subpoena is unreasonable in that it fails to give adequate time for compliance. Fed. R. Civ. P. 45(c)(3)(A)(i) notes that a subpoena to a non-party must allow “reasonable time” for compliance. Decisions in interpreting reasonable time are instructive—“Although the Rule does not specify exactly what a reasonable time is, Rule 45(c)(2)(B) appears to set a presumptive time of 14 days after service to respond.” *McClendon v. TelOhio Credit Union, Inc.*, No. 2:05-CV-1160, 2006 WL 2380601, at *2 (S.D. Ohio Aug. 14, 2006) (emphasis added). CareFusion’s subpoena was noticed for exactly 14 days after the service date. However, given the depositions occurring in this case, counsel is unavailable for any depositions before March 16, effectively giving Dr. Foor only one week in which to schedule his deposition, which is unreasonable. *See*,

e.g., AngioScore, Inc. v. TriReme Med., Inc., No. 12-Civ-03393, 2014 WL 6706898, at *1 (N.D. Cal. Nov. 25, 2014) (finding subpoena procedurally defective as unreasonable as it required compliance within nine days); *United States v. Woods*, 433, 442 n.3 (E.D. Va. 1996) (obtaining subpoenas seven days before hearing did not allow a reasonable enough time to comply); *In re Stratosphere Corp. Securities Litigation*, 183 F.R.D. 684, 687 (D. Nev. 1999) (subpoena served with six days' notice was not reasonable).

II. CareFusion's Subpoena of Dr. Foor is Unduly Burdensome

Forcing Dr. Foor to cancel appointments and procedures booked months in advance, jeopardizes his patients' health, risks his reputation as a vascular surgeon, and unduly burdens his busy schedule. The unreasonableness of CareFusion's request is emphasized by the fact that Dr. Foor was already deposed for almost seven hours over nearly nine months ago, and that no material issues warranting additional testimony have been raised. *See PKF Int'l Corp. v. IBJ Schroder Leasing Corp.*, No. 93-Civ-1816, 1996 WL 591213, at *2 (S.D.N.Y. Oct. 15, 1996) (granting motion to quash subpoenas to the extent they sought second depositions of the same deponents). Moreover, the information sought, as identified in CareFusion's pretrial disclosures, is available from its own witnesses. For example, CareFusion's pretrial disclosures state that Dr. Foor may testify about the recognition of CareFusion's CHLORAPREP brand in the medical/surgical community—a topic that is already being covered by at least CareFusion's own witness, Jan Creidenberg (Marketing Manager), if not its other witness, Jennifer Raeder-Devens, too, as well as documentary evidence it has submitted. Information regarding the few remaining topics identified in connection with Dr. Foor would seemingly be obtained from documents already introduced into evidence, as well as CareFusion's own witnesses. The need for Dr. Foor's second deposition is far from clear.

Of course, CareFusion's counsel could have notified Entrotech's counsel at the time of Dr. Foor's deposition that it intended to use his discovery deposition as testimony. That way, Entrotech's counsel could have cross-examined him, avoiding the unnecessary time and expense of a duplicative deposition and sparing the parties' resources. Such expenses outweigh any marginal benefit that CareFusion could receive by re-deposing the same witness on the same topics. Dr. Foor should not suffer the consequences of the missteps of CareFusion, and Entrotech should not be forced to stipulate to the entry of his previous testimony into evidence without having had the opportunity to exercise its right to cross-examine him.

III. CareFusion Has Not Genuinely Attempted to Avoid Undue Burden and Entrotech Is Not Required to Stipulate to the Admission of Dr. Foor's Discovery Deposition as Testimony to Correct CareFusion's Error

CareFusion will likely argue that it attempted to avoid placing an undue burden on Dr. Foor by requesting that Entrotech stipulate to the admissibility of Dr. Foor's discovery deposition transcript into evidence under the Trademark Rules of Practice. This argument is misplaced. The T.T.A.B.'s Manual of Procedure makes clear that discovery depositions may only be offered into evidence for a party who, at the time of taking the deposition, was an officer, director, managing agent, or 30(b)(6) witness. 37 C.F.R. § 2.120(j) (emphasis added). Dr. Foor's June 17, 2014 deposition was taken for purposes of fact discovery only; he remains a non-party to the suit because he was not an officer, director, managing agent, or 30(b)(6) designee, and he never held himself out to be in any such position at the time of his deposition. Importantly, Dr. Foor has never held the position of an officer and has never held any title giving him authority to bind Entrotech. Nevertheless, CareFusion improperly submitted Dr. Foor's discovery deposition via a Notice of Reliance under this Rule. Entrotech plans to separately object to the T.T.A.B. regarding the deposition's admissibility, and will move to strike it in its entirety from CareFusion's affirmative case.

IV. The Subpoena is Procedurally Defective

Unlike civil cases in federal courts, in which attorneys may issue subpoenas, only a Clerk of Court may issue a subpoena arising out of T.T.A.B. matter. *See* 35 U.S.C. § 24. Here, CareFusion failed to apply to the Clerk of Court for the Southern District of Ohio to have the subpoena properly issued, as required by the plain language of 35 U.S.C. § 24. (The clerk of any United States court for the district wherein testimony is to be taken for use in any contested case in the Patent and Trademark Office, shall, upon the application of any party thereto, issue a subpoena for any witness residing or being within such district, commanding him to appear and testify before an officer in such district authorized to take depositions and affidavits, at the time and place stated in the subpoena.) As a result of this procedural error, this subpoena—and CareFusion’s service of same—are invalid and ineffective.

CONCLUSION

For the foregoing reasons, Dr. Foor respectfully requests that this Court quash the subpoena served by CareFusion. At a minimum, Dr. Foor requests that it be modified to a date that gives him reasonable notice to comply.

Respectfully submitted,

/s/ Timothy R. Bricker
Timothy R. Bricker (0061872)
CARPENTER LIPPS AND LELAND LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, OH 43215 Telephone: (614) 365-4100
Facsimile: (614) 365-9145
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Trial Attorney for Dr. John S. Foor, M.D.

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Erin M. Hickey
FISH & RICHARDSON P.C.
12390 El Camino Real
San Diego, CA 92130
Telephone: (858) 678-5070
Email: hickey@fr.com

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically on March 11, 2015. Notice was sent by operation of the Court's electronic filing system to all counsel who have entered an appearance and any parties who have entered an appearance through counsel. Notice was also sent by regular U.S. mail or electronic mail to the following:

Mary R. True
Deitler True LLC
19 East Kossuth
Columbus, OH 43206
mtrue@ustrademarklawyer.com

/s/ Timothy R. Bricker
One of the Attorneys for Dr. John S. Foor, M.D.

616980

EXHIBIT 1

UNITED STATES DISTRICT COURT

for the

Southern District of Ohio

CareFusion 2200, Inc.

Plaintiff

v.

Entrotech Life Sciences, Inc.

Defendant

Civil Action No. TTAB Opposition 91206212

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To:

John S. Foor, MD

(Name of person to whom this subpoena is directed)

☒ **Testimony:** **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Place: Dreitler True LLC 19 East Kossuth Street Columbus, OH 43206	Date and Time: 03/19/2015 10:00 am
--	---------------------------------------

The deposition will be recorded by this method: stenographic means

- ☐ **Production:** You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 03/04/2015

CLERK OF COURT

OR

/Mary R. True/

*Signature of Clerk or Deputy Clerk*_____
*Attorney's signature*The name, address, e-mail address, and telephone number of the attorney representing (name of party) CareFusion 2200

_____, who issues or requests this subpoena, are:
Mary R. True, Dreitler True LLC, 19 East Kossuth, Cols, OH 43206, mtrue@ustrademarklawyer.com, 614-449-6642

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. TTAB Opposition 91206212

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____
on *(date)* _____ .

☐ I served the subpoena by delivering a copy to the named individual as follows: _____

_____ on *(date)* _____ ; or

☐ I returned the subpoena unexecuted because: _____
_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____ .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)**(c) Place of Compliance.**

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

Civil Action No. TTAB Opposition 91206212

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for (name of individual and title, if any) John S. Foos M.D.
on (date) 3.4.15.

☒ I served the subpoena by delivering a copy to the named individual as follows:
Receptionist "Sally S." on behalf of John S. Foos M.D.
on (date) 3.5.15; or

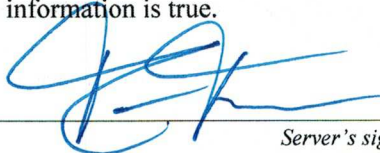
☐ I returned the subpoena unexecuted because: _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: 3.5.15



Server's signature

Ron Freeman, Private Process Server
Printed name and title

2400 Indiana Ave. Columbus, OH 43202
Server's address

Additional information regarding attempted service, etc.:

Exhibit G

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

**IN THE MATTER OF Trademark Application Serial Nos. 85499349; 85499345; 85499337
and 85499332**

DATE OF PUBLICATION: May 29, 2012

CareFusion 2200, Inc.,)	
)	
Opposer,)	Combined Opposition No. 91206212
)	
v.)	
)	
Entrotech Life Sciences,)	
)	
Applicant.)	

NOTICE OF TESTIMONY DEPOSITION OF DR. JOHN FOOR

PLEASE TAKE NOTICE that pursuant to 37 C.F.R. § 2.123(a), Opposer CareFusion 2200, Inc. will take the testimony deposition upon oral examination of Dr. John Foor, Medical Consultant, Entrotech Life Sciences. The deposition testimony will be recorded by stenographic means at the offices of Dreitler True LLC, 19 E. Kossuth St., Columbus, OH 43206. Dr. Foor will testify on the matters previously identified in Opposer's Pretrial Disclosures, attached hereto and incorporated by reference herein. The deposition will commence at 10:00 am on Thursday, March 19, 2015. If necessary, the deposition will be adjourned until completed.

Dated: March 12, 2015

Respectfully submitted,

/s/ Mary R. True
Mary R. True
Joseph R. Dreitler
DREITLER TRUE LLC
19 E. Kossuth St.
Columbus, Ohio 43206
Telephone: (614) 449-6642

Email: jdreitler@ustrademarklawyer.com
mtrue@ustrademarklawyer.com
Attorneys for Opposer CareFusion 2200, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via hand delivery upon Applicant's attorney of record, Ms. Erin M. Hickey, Esq., in this proceeding on this 12th day of March, 2015.

/s/ Mary R. True
Mary R. True

Exhibit H

UNITED STATES DISTRICT COURT

for the
Southern District of Ohio

CareFusion 2200, Inc.

Plaintiff

v.

Entrotech Life Sciences, Inc.

Defendant

Civil Action No. 2:15-mc-00016

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: John S. Foor, MD

(Name of person to whom this subpoena is directed)

☒ **Testimony:** **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

See attached: Notice of Testimony Deposition of Dr. John Foor and Opposer's Pretrial Disclosures

Place: Dreitler True LLC 19 E. Kossuth St. Columbus, OH 43206	Date and Time: 03/23/2015 9:00 am or date Ordered by Court
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The deposition will be recorded by this method: stenographic means

☐ **Production:** You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 03/17/2015

CLERK OF COURT

Melina Saddler

Signature of Clerk or Deputy Clerk

OR

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* _____

CareFusion 2200, Inc.

, who issues or requests this subpoena, are:

Mary R. True, Dreitler True LLC, 19 E. Kossuth, Columbus, OH 43206, mtrue@ustrademarklawyer.com, 614-449-6642

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 2:15-mc-00016

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for (name of individual and title, if any) _____
on (date) _____.

☐ I served the subpoena by delivering a copy to the named individual as follows: _____
_____ on (date) _____; or

☐ I returned the subpoena unexecuted because: _____
_____.

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

**IN THE MATTER OF Trademark Application Serial Nos. 85499349; 85499345; 85499337
and 85499332**

DATE OF PUBLICATION: May 29, 2012

CareFusion 2200, Inc.,)	
)	
Opposer,)	Combined Opposition No. 91206212
)	
v.)	
)	
Entrotech Life Sciences,)	
)	
Applicant.)	

AMENDED NOTICE OF TESTIMONY DEPOSITION OF DR. JOHN FOOR

PLEASE TAKE NOTICE that pursuant to 37 C.F.R. § 2.123(a), Opposer CareFusion 2200, Inc. will take the testimony deposition upon oral examination of Dr. John Foor, Medical Consultant, Entrotech Life Sciences. The deposition testimony will be recorded by stenographic means at the offices of Dreitler True LLC, 19 E. Kossuth St., Columbus, OH 43206. Dr. Foor will testify on the matters previously identified in Opposer's Pretrial Disclosures, attached hereto and incorporated by reference herein. The deposition will commence at 9:00 am on Monday, March 23, 2015. If necessary, the deposition will be adjourned until completed.

Dated: March 17, 2015

Respectfully submitted,

/s/ Mary R. True
Mary R. True
Joseph R. Dreitler
DREITLER TRUE LLC
19 E. Kossuth St.
Columbus, Ohio 43206
Telephone: (614) 449-6642

Email: jdreitler@ustrademarklawyer.com
mtrue@ustrademarklawyer.com
Attorneys for Opposer CareFusion 2200, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via email upon counsel for Applicant, Erin Hickey, Esq., at hickey@fr.com on this 17th day of March, 2015.

/s/ Mary R. True
Mary R. True